Louisiana Law Review

Volume 33 | Number 3
Spring 1973

Duty-Risk - An Alternative to Proximate Cause?

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guards which the Supreme Court held in *Boykin v. Alabama*[17] were constitutionally required to assure the exercise of a voluntary and intelligent choice. Moreover, the plea of guilty is entered in an atmosphere of calm, decorum, and dignity, and must be free of influences that may *taint* the constitutional waiver. Because the extra-judicial confession or admission is made in the absence of such protections, the "indicia of reliability" is significantly reduced. Even if it be assumed that the confession is reliable, it is not certain that the accused will be convicted at trial. A confession or admission is merely evidence; it is not tantamount to conviction. *The critical issue is that an individual who pleads guilty involuntarily has been deprived of his option to trial by jury where he may have been adjudged innocent.* Viewing the guilty plea in this light, it is difficult, to avoid the *Reese* conclusion that a subsequent confession cannot breathe new life into an otherwise void plea of guilty, and that an individual aggrieved by an involuntary plea should be permitted to regain his position *status quo ante*.[18]

Finally, it does not appear that an involuntary guilty plea should be considered "harmless error" unless the state could prove "beyond a reasonable doubt" that, irrespective of the constitutional violation, a plea of guilty would still have been tendered and the same penalty imposed[19]—a seemingly impossible task.

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DUTY-RISK—AN ALTERNATIVE TO PROXIMATE CAUSE?

After completing roofing repairs, defendant's employees left a ladder leaning against a house. Subsequently, an unknown third party moved the ladder and laid it flat on the ground. Plaintiff,

17. 395 U.S. 238, 243 (1969). In *Boykin*, the Supreme Court held that a guilty plea must be fully supported on the court record by an affirmative showing that it was voluntarily and intelligently made. In a recent decision the Louisiana supreme court followed the mandate of *Boykin* and established guidelines to be used in accepting a plea. State *ex rel.* Jackson v. Henderson, 260 La. 90, 255 So.2d 85 (1971). *But see* State *ex rel.* LeBlanc v. Henderson, 262 La. 185, 262 So.2d 786 (1972).

18. *Cf.* Boykin v. Alabama, 395 U.S. 238 (1969); Kerscheval v. United States, 274 U.S. 220 (1927). As has been stated: "The judgment and sentence which followed a plea of guilty are based *solely* upon the plea." Busby v. Holman, 356 F.2d 75, 77-78 (5th Cir. 1966). (Emphasis added.)

19. *Cf.* Harrington v. California, 395 U.S. 250 (1969); Chapman v. California, 386 U.S. 18, 24 (1967).

a babysitter at the house, saw a child for whom she was caring run toward the ladder. In an effort to prevent the child from falling over the ladder, plaintiff herself tripped over it and sustained injuries. In a suit for damages, the Louisiana supreme court reversed the appellate decision for plaintiff[1] and *held* that "[a] rule of law which would impose a duty upon one not to leave a ladder standing against a house [did] not encompass the risk [there] encountered." *Hill v. Lundin & Associates, Inc.*, 260 La. 542, 556, 256 So.2d 620, 623 (1972).

The result reached by the court in *Hill v. Lundin & Associates, Inc.*, could be expected from a reading of the facts. This Note, however, centers on the interesting technique employed by the court in order to find the defendant free from liability.

Courts are often faced with the problem of defining the limits of liability for conduct which has been admittedly careless. Traditionally, courts have relied upon proximate cause to mark these limits[2] and have stated that plaintiff's injuries should be the natural, probable, or foreseeable consequences[3] of defendant's conduct in order for liability to attach.

1. 243 So.2d 121 (La. App. 1st Cir. 1971). Plaintiff's employer was also a defendant in the suit. However, the appellate court found the employer free from negligence. In holding the defendant contractor liable, the lower court applied the doctrine of momentary forgetfulness to defeat defendant's plea of contributory negligence.

2. Craig v. Burch, 228 So.2d 723, 729 (La. App. 1st Cir. 1969): "It appears the proximate cause concept has been employed by the courts to extend or restrict liability at the court's discretion . . . ." *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 42, at 244 (4th ed. 1971) [hereinafter cited as PROSSER]; Green, *Duties, Risks, Causation Doctrines*, 41 TEXAS L. REV. 42, 72 (1962).

Under the proximate cause concept, for liability to attach, courts have required that the defendant's negligence be not only the cause-in-fact of plaintiff's injuries but also the proximate cause of those injuries. *See, e.g.*, Fabre v. B.F. Goodrich Co., 218 So.2d 617 (La. App. 4th Cir. 1969); Hoover v. Wagner, 189 So.2d 20 (La. App. 1st Cir. 1966); Allen v. Honeycutt, 171 So.2d 770 (La. App. 2d Cir. 1965); Harvey v. Great Am. Indem. Co., 110 So.2d 595 (La. App. 2d Cir. 1958).

3. *See, e.g.*, Rossiter v. Aetna Cas. & Sur. Co., 255 So.2d 103 (La. App. 2d Cir. 1971) (foreseeable); Craig v. Burch, 228 So.2d 723 (La. App. 1st Cir. 1969) (natural, probable and foreseeable); Hoover v. Wagner, 189 So.2d 20 (La. App. 1st Cir. 1966) (natural and foreseeable); Manning v. Fortenberry Drilling Co., 107 So.2d 713 (La. App. 2d Cir. 1958) (natural and probable); Roca v. Prats, 80 So.2d 176 (La. App. Orl. Cir. 1955) (foreseeable); Stumpf v. Baronne Bldg., Inc., 16 La. App. 702, 135 So. 100 (Orl. Cir. 1931) (natural and probable).

Courts have also said that it is no defense that the particular consequences were not foreseeable. *See* Lasyone v. Zenoria Lmbr. Co., 163 La. 185, 111 So. 670 (1927); Lynch v. Fisher, 34 So.2d 513 (La. App. 2d Cir. 1948); Finney v. Banner Cleaners & Dyers, 13 La. App. 101, 126 So. 573 (Orl. Cir. 1930).

Another requirement has been that defendant's conduct must produce

In 1962, the Louisiana supreme court in *Dixie Drive It Yourself System v. American Beverage Co.*[4] avoided the usual proximate cause approach in dealing with tort liability under a criminal statute.[5] Rather than determine that the violation of the statute was the proximate cause of plaintiff's injuries,[6] the court stated that "[t]he essence of the present inquiry is whether the risk and harm encountered by the plaintiff fall within the scope of protection of the statute."[7] To answer this question, the court attempted to determine whether the legislature intended to protect motorists from the specific hazard[8] involved in that case. By finding that the risk was within the statute's protective scope, the court allowed recovery and avoided a discussion of proximate cause.[9]

This process of determining whether the duty imposed on the defendant protects against a particular risk or hazard can be referred to as a "duty-risk" approach. It has been applied by the Louisiana supreme court and appellate courts in several sub-

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plaintiff's injuries in a continuing sequence unbroken by an enfficient intervening force. *See* Rossiter v. Aetna Cas. & Sur. Co., 255 So.2d 103 (La. App. 2d Cir. 1971); Hoover v. Wagner, 189 So.2d 20 (La. App. 1st Cir. 1966).

4. 242 La. 471, 137 So.2d 298 (1962).

5. La. Acts 1936, No. 164, § 2 (repealed by La. Acts 1962, No. 310, § 399, now LA. R.S. 32:369).

6. Ardoin v. Williams, 108 So.2d 817, 820 (La. App. 2d Cir. 1959) ("The rule is well recognized that negligence consisting of the violation of a statute or ordinance is not actionable unless it is the proximate cause of the injury."); Williams v. Pelican Creamery, 30 So.2d 574, 577 (La. App. 1st Cir. 1947) ("[T]o hold one who violates the law responsible . . . it must appear that the manner of violation was one of the proximate causes of [the] accident and resulting injury."); O'Neil v. Hemenway, 3 So.2d 210, 213 (La. App. Orl. Cir. 1941) ("It is well settled that a violation of law constitutes actionable negligence only where the violation is the proximate cause of the injury or death.").

7. 242 La. at 488, 137 So.2d at 304.

8. In *Dixie*, defendant's employee had violated the statute by failing to display the required warning flags after stopping his truck on the highway. Plaintiff owned a truck that was leased to a third party. While driving inattentively, the third party struck the rear of defendant's truck. Plaintiff sued for damages to the leased truck. The relationship between plaintiff and his lessee was considered to be that of a bailor and bailee. Therefore, the lessee's negligence could not be imputed to plaintiff so as to defeat his recovery on a theory of contributory negligence. Thus the court had to determine what effect, if any, the intervening negligence of the third party would have on any possible liability of the defendant. Phrased in terms of hazard, the court had to decide if the statute was intended to protect inattentive motorists from rear end collisions.

9. Regarding proximate cause, the court in *Dixie* stated that "[a]s employed by courts, proximate cause is a legal concept without fixed content. It is used indiscriminately to refer to cause-in-fact, the scope of liability, and other negligence factors." 242 La. at 494-95, 137 So.2d at 307.

sequent cases involving *statutory* duties[10] and by some appellate courts wherein the duty was *court-made*.[11] However, until the instant case, the Louisiana supreme court had not applied the duty-risk approach to a *court-made* duty. The court noted that in either situation,

> "the process of determining the risk encompassed within the rule of law is nevertheless similar. The same policy considerations which would motivate a legislative body to impose duties to protect from certain risks are applied by the court in making its determination."[12]

The court concluded that the defendant's duty did not encompass the risk involved. To obtain this result, the court did not embark on a discussion of policy, but rather stated, in language more characteristic of proximate cause than duty-risk, that the defendant could not "have reasonably anticipated that a third person would move the ladder."[13] Although foreseeability of harm does play a proper role in negligence law,[14] its use here[15]

10. *See, e.g.*, Rowe v. Travelers Ins. Co., 253 La. 659, 219 So.2d 486 (1969); O'Conner v. St. Louis Fire & Marine Ins. Co., 217 So.2d 750 (La. App. 4th Cir. 1969); Jackson v. Beechwood, Inc., 180 So.2d 732 (La. App. 1st Cir. 1965); Champagne v. Southern Farm Bureau Cas. Ins. Co., 170 So.2d 226 (La. App. 4th Cir. 1964); Steagall v. Houston Fire & Cas. Co., 138 So.2d 433 (La. App. 3d Cir. 1962). For a discussion of these and other cases applying *Dixie* see Malone, *Ruminations on Dixie Drive It Yourself Versus American Beverage Company*, 30 LA. L. REV. 363 (1970) [hereinafter cited as Malone, *Ruminations*].

The process involved in the duty-risk approach has likewise been used when the courts state that they are using the traditional doctrine of proximate cause. *See* Kinchin v. Hansbrough, 231 So.2d 700 (La. App. 1st Cir. 1970); Bertrand v. Trunkline Gas Co., 149 So.2d 152 (La. App. 3d Cir. 1963).

11. *See, e.g.*, Todd v. Aetna Cas. & Sur. Co., 219 So.2d 538 (La. App. 3d Cir. 1969); Hall v. State, 213 So.2d 169 (La. App. 3d Cir. 1968); Newton v. Allstate Ins. Co., 209 So.2d 744 (La. App. 2d Cir. 1968); Dartez v. City of Sulphur, 179 So.2d 482 (La. App. 3d Cir. 1965); Norton v. Argonaut Ins. Co., 144 So.2d 249 (La. App. 1st Cir. 1962). For a discussion of these cases see Malone, *Ruminations*.

12. Hill v. Lundin & Associates, Inc., 260 La. 542, 549-50, 256 So.2d 620, 622-23 (1972).

13. *Id.* at 551, 256 So.2d at 623.

14. *See* PROSSER § 43, at 251-52; Green, *Foreseeability in Negligence Law*, 61 COLUM. L. REV. 1401 (1961). *See also* Laird v. Travelers Ins. Co., 263 La. 199, ____ n.1, 267 So.2d 714, 719 n.1 (1972); Bergeron v. Houston-Am. Ins. Co., 98 So.2d 723 (La. App. 1st Cir. 1957).

15. There was sufficient proximate cause jurisprudence available if the court had wished to dispose of the case under that approach. Stumpf v. Baronne Bldg., Inc., 16 La. App. 702, 704-05, 135 So. 100, 102 (Orl. Cir. 1931): "The rule of law is that a party is responsible for the reasonably to be expected consequences of a negligent act, but, where an intervening independent act of negligence breaks the chain of causation, then the proximate cause is the act of intervening negligence, and not the original act of negligence." *See also* Kern v. Bumpas, 102 So.2d 263 (La. App. 2d Cir. 1958); Kendall v. New Orleans Pub. Serv., Inc., 45 So.2d 541 (La. App. Orl. Cir. 1950).

seems only to detract from the court's attempt to avoid proximate cause.

The application of a duty-risk approach in cases involving statutory duties might suggest that its use would be more appropriate when applied to particularized duties. In most negligence cases, however, a defendant's duty is generally referred to in broad terms as a duty to use reasonable care.[16] Nevertheless, in every case the plaintiff must point to some specific conduct of the defendant that "is prohibited by 'law'; and 'law' here can realistically be regarded only as the particularized court-made rules with which the defendant's conduct has allegedly conflicted."[17] Thus, it is possible to formulate a particular duty derived from the standard of reasonable care and the specific conduct in question.[18] For example, in *Hill* the defendant's allegedly prohibited conduct was leaving a ladder leaning against a house. It could appropriately be observed that reasonable care would require one not to leave a ladder in such a position. From this reasoning, the specific question before a court becomes: Is the risk of tripping over a ladder placed on the ground by an unknown third party protected by a duty not to leave a ladder leaning against a house?

16. *See, e.g.*, Taylor v. National Indem. Co., 215 So.2d 203 (La. App. 3d Cir. 1968); Vidrine v. General Fire & Cas. Co., 168 So.2d 449 (La. App. 3d Cir. 1964); Lyons v. Jahncke Serv., Inc., 125 So.2d 619 (La. App. 1st Cir. 1960). *See generally* L. GREEN, JUDGE & JURY 59 (1930); PROSSER § 53, at 324.

17. Malone, *Ruminations*, at 388.

18. *Id.* at 387-88: "There is sound reason for extending to judge-made rules the same approach that prevails for rules enacted in criminal statutes or ordinances. The body of law we call *negligence* can appropriately be regarded as a mass of particularized duties which share a common characteristic called 'reasonable behavior.' Although we tend to muse upon negligence as though it enjoys an independent ideational existence of its own, yet in truth negligence represents only an aggregate of very specific exactions devised by courts to control particular items of human conduct. In actual controversies no one is negligent in the abstract. Instead, a defendant is chargeable with negligence in that he failed to maintain a reasonable diligent watchout, or he failed to maintain a reasonable speed, or he failed to give an appropriate signal upon turning his vehicle, and so on. Always he is chargeable with some specific shortcoming that is prohibited by 'law'; and 'law' here can realistically be regarded only as the body of particularized court-made rules with which the defendant's conduct has allegedly conflicted. It follows that these rules, like the statutory rules of legislatures or city councils, must be given appropriate boundaries by the courts in cases as they arise. The protective limits of each prohibition must be fixed and there must be a determination as to which hazards fall within or without the protective boundary. Hence the problem faced in *Dixie* is not one that is peculiar to statutory interpretation. I suggest that all the niceties of proximate cause language represent efforts to bound legal duties in cases where no statute is involved without betraying the creative judicial process which, in truth, is at work in each instance."

In comparing the duty-risk and proximate cause approaches one may not discover a sharp difference. Both techniques function as judicial tools to limit or extend liability once it is determined that the defendant's conduct is a cause-in-fact of plaintiff's injuries; and under either approach the courts may reach the same results.[19] Under proximate cause, courts couch their decisions in causation language and yet they may rely on policy as a factor in making their decisions.[20] On the other hand, a duty-risk approach does not employ rules or tests, but openly resorts to judicial and legislative policy as criteria in defining the limits of liability.[21] The principal difference, therefore, appears to be largely one of choice of expression.

A greater difference between the two approaches may be recognized in the setting of a jury trial. The term "proximate cause" and the language surrounding its use emphasize a factual determination inviting a decision by the jury on that question;[22] whereas questions of duty are clearly for the judge.[23] Conse-

19. In *Hill*, the court could have reached the same result by simply relying upon previous jurisprudence that had employed proximate cause. *See* note 15 *supra*.

20. Craig v. Burch, 228 So.2d 723, 729 (La. App. 1st Cir. 1969): "It appears the proximate cause concept has been employed by the courts to extend or restrict liability . . . . Such application is only of policy . . . ." *See also* L. GREEN, RATIONALE OF PROXIMATE CAUSE 122 (1927); Comment, 16 LA. L. REV. 391, 396 (1956): "This determination of the particular risks to plaintiff that fall within the ambit of protection of the rule of law on which plaintiff relies is the determination of the issue of proximate cause."

"In the aggregate, these considerations of judicial policy [ease of associating the risk to the rule of law, moral considerations, administrative considerations, economic good, and the type of activity in which defendant engages] are the only dependable criteria for the determination of the issue of proximate cause." *Id.* at 398. (Italics omitted.)

21. PROSSER § 53, at 325-26: "'[D]uty' is not sacrosanct in itself but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection." Green, *Duties, Risks, Causation Doctrines*, 41 TEXAS L. REV. 42, 45 (1962): "The determination of the issue of duty and whether it includes the particular risk imposed on the victim ultimately rests upon broad policies which underlie law. These policies may be characterized generally as morality, the economic good of the group, practical administration of the law, justice as between the parties and other considerations relative to the environment out of which the case arose." Perhaps the most direct statement made regarding judicial policy as the basis of a decision is that found in *Todd v. Aetna Cas. & Sur. Co.*, 219 So.2d 538, 544 (La. App. 3d Cir. 1969): "As a matter of legal policy we hold that defendant's duty did not include protection against such unforeseeable consequences as occurred here."

22. RESTATEMENT (SECOND) OF TORTS § 328 C(c) (1965); PROSSER § 45, at 289; *cf.* LA. R.S. 45:563 (1950) (providing for jury determination of proximate cause in connection with accidents due to violation of the statute imposing a duty to stop at railroad crossings).

23. RESTATEMENT (SECOND) OF TORTS § 328 B(b) (1965); PROSSER § 37, at 206.

quently, when proximate cause is used in a jury trial, a jury can define the limits of a defendant's liability; under a duty-risk approach, however, the judge must assume this responsibility. If proximate cause were completely abandoned in favor of duty-risk, it appears that a jury would be precluded from participating in the process of defining the limits of a defendant's liability. However, there may be cases in which the judge desires jury participation in the process. This possibility seems to warrant the retention of proximate cause in negligence cases, and thereby affords a proper vehicle to present the issue to the jury.

Nevertheless, a duty-risk approach has its advantages. By openly resorting to judicial or legislative policy, it affords the court greater flexibility than the use of proximate cause in the decision-making process. Unlike the case with proximate cause, it also directs the readers of judicial decisions to the factors that motivated the court in making its decision.[24] It should be noted, however, that a movement toward a duty-risk approach does not guarantee a solution to the problems of liability, but merely poises it for solution.

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VOIR DIRE EXAMINATION AS TO FUNDAMENTAL RULES OF LAW

On voir dire examination in a criminal prosecution, defense counsel sought to ask each prospective juror whether he could afford the defendant his legal presumption of innocence, and whether he would be affected by defendant's refusal to testify. The trial judge refused to allow the questions because he had previously instructed the entire panel as to these and other fundamental rules of law applicable in all criminal cases. He allowed only a general question as to whether the juror would apply the law as instructed by the court. The Louisiana supreme court reversed and *held*, since the preliminary instructions were

24. Ordinarily, courts do not openly rely on judicial or legislative policy as motivating factors in decisions under proximate cause. However, some writers have asserted that the underlying factors in most proximate cause decisions were judicial and/or legislative policy, thus making it difficult to determine the criteria which the court did use in making its decision. *See* L. GREEN, RATIONALE OF PROXIMATE CAUSE 122 (1927); Comment, 16 LA. L. REV. 391, 396 (1956).